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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Health Quest of Farmington, PLLC

Serial No. 76/213,013

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Groh, Sprinkle for Health Quest of Farmington, PLLC.

Glenn Mayerschoff, Trademark Examining Attorney, Law Office
106 (Mary Sparrow, Managing Attorney).

Before Simms, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On February 20, 2001, Health Quest of Farmington, PLLC
(applicant) applied to register the mark HEALTH QUEST
(typed) on the Principal Register for "chiropractic
services" in International Class 42.¹

¹ Serial No. 76/213,013. The application contains an assertion of a date of first use and a date of first use in commerce of "at least as early as late 1997" and a disclaimer of the word "Health."

The examining attorney² ultimately refused to register the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of a registration for the mark HEALTHQUEST INTEGRATED THERAPY, in typed form, for "Providing health care integrated massage therapy services, namely, neuromuscular therapy, myofascial release therapy, physical therapy and deep tissue massage" in International Class 42.³

After the examining attorney made the refusal final, this appeal followed. An oral hearing was held on May 21, 2003.

The examining attorney's position is that the additional wording in the registered mark is not sufficient to distinguish applicant's and registrant's marks. The examining attorney has observed that the term "Integrated Therapy" is disclaimed and that both marks "suggest that consumers can find or fulfill their search for good health with the services." Brief at 3. Regarding the relatedness of the services, the examining attorney relies on a definition of "chiropractic" as "a system of diagnosis and treatment based on the belief that many diseases are caused

² The current examining attorney was not the original examining attorney in this case.

³ Registration No. 2,450,472 issued May 15, 2001. The registration contains a disclaimer of the term "Integrated Therapy."

by pressure on nerves due to misalignments (subluxations) of the spinal column and that such diseases can be treated by correction (e.g., by massage) of the misalignment." *Dictionary of Medical Terms for the Nonmedical Person* (4th ed. 2000). The examining attorney also relies on several registrations to show that "chiropractors often offer complementary body work services such as massage and physical therapy." Brief at 4. Based on this evidence, the examining attorney concludes that a "significant likelihood of confusion exists in the present case." Brief at 5.

Applicant, on the other hand, argues that the presence of the term "Integrated Therapy" in the registered mark creates a mark with a different commercial impression than that created by applicant's mark. In addition, applicant argues that the common element "health quest" is "weak and entitled to only narrow protection." Brief at 3. To support its argument that the term "health quest" is weak, applicant attached information from fifteen websites showing use of that term "in the health care field." Id. Finally, applicant argues that chiropractic services and massage therapy services are not related closely enough to support a conclusion that confusion is likely.

In each case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by comparing applicant's and registrant's marks. Applicant's mark consists of the words HEALTH QUEST while registrant's mark is HEALTHQUEST INTEGRATED THERAPY. We note that the differences in the marks are that (1) applicant spells the term "health quest" as two words while registrant depicts the term as one word, and (2) registrant's mark includes the disclaimed words "integrated therapy." The differences are not substantial. The presence or absence of a space is not significant. Stockpot, Inc. v. Stock Pot Restaurant, Inc., 220 USPQ 52, 54 (TTAB 1983), aff'd, 737 F.2d 1576, 222 USPQ 665 (Fed.

Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); In re Best Western Family Steak House, Inc., 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical").

Concerning the additional wording in registrant's mark, the presence of disclaimed, descriptive wording does not usually result in marks having substantially different appearances, meanings, or commercial impressions.

"Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'"

Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1845-46 (Fed. Cir. 2000), quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). See also In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (Court held that the addition of "The," "Cafe" and a diamond-shaped design to registrant's DELTA mark still resulted in a likelihood of confusion). Here, the descriptive term "Integrated Therapy" for "health care *integrated* massage *therapy*

services" would similarly not serve to distinguish the marks.

We compare the marks in their entirety, but "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data, 224 USPQ at 751. While the marks are not identical, a "[s]ide-by-side comparison is not the test. The focus must be on the 'general recollection' reasonably produced by appellant's mark and a comparison of appellee's mark therewith." Johann Maria Farina Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972) (citation omitted).

We find that the marks are dominated by the phonetically identical term "health quest" and they are similar in their appearance, pronunciation, and meaning. Both marks suggest that the relevant services are important in the quest for better health. The overall commercial impression is not significantly altered by the addition of the term "integrated therapy" because the term is descriptive of registrant's integrated massage therapy services, and therapeutic massage services, as discussed subsequently, are associated with chiropractic services.

Potential customers are likely to assume that applicant's services are simply additional services available from a source associated with registrant.

Next, we consider whether the services of applicant and registrant are related. "In order to find that there is a likelihood of confusion, it is not necessary that the goods or services on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources."

McDonald's Corp. v. McKinley, 13 USPQ2d 1895, 1898 (TTAB 1989). See also In re Opus One Inc., 60 USPQ2d 1812, 1814-15 (TTAB 2001). We must consider the services as they are identified in the application and registration. Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"); Dixie Restaurants, 41 USPQ2d at 1534 (punctuation in original), quoting, Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) ("Likelihood of confusion must be determined based on an

analysis of the mark applied to the ... services recited in applicant's application vis-à-vis the ... services recited in [a] ... registration, rather than what the evidence shows the ... services to be").

While applicant's services are "chiropractic services and registrant's services are health care integrated massage therapy services, they are far from being dissimilar. We start with the point that registrant's services are not simply "massage therapy" services. They are specifically identified as "health care integrated massage therapy services..." so both registrant's services and applicant's chiropractic services are in the field of health care. Certainly, the simple fact that two services pertain to health care does not mean that the services are related. In this case though chiropractic treatment is based on the belief that "diseases can be treated by correction (e.g., *by massage*) of the misalignment [of the spinal column]." The fact that a significant feature of applicant's and registrant's services involves the use of massage as part of health care services is important to our finding that the services are related.

There is other evidence that the services are related and it consists of the examining attorney's use-based registrations that provide some suggestion that

chiropractic and therapeutic massage services may originate from the same source. See Registration Nos. 2,387,463; 2,395,866; 2,468,836; 2,353,887; 2,511,767; 2,533,782; and 2,537,397. These registrations provide some support for the examining attorney's argument that chiropractic and massage therapy services are related because they show that the same entity has registered a common mark for both services. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993). The evidence of record convinces us that chiropractic and massage therapy service are related.

One of applicant's main argument is that the registered mark is weak and entitled to only a narrow scope of protection. Applicant has submitted copies of fifteen web pages alleging showing others using the term "health quest." A review of these pages shows use of the term "health quest": in the body of articles; as a term in a complete web page address; to refer to an online newsletter

in the field of herbal medicine; to refer to an online vitamin supplier in the United Kingdom; to refer to websites concerning holistic medicine, hair mineral health, turnkey operations for setting up hospitals, and job fairs in the field of health care; and to refer to seminars and workshops for healthy lifestyles and nutritional supplements. Extensive third party uses is a factor to consider in determining whether there is a likelihood of confusion. See In re Broadway Chicken, Inc., 38 USPQ2d 1559 (TTAB 1996). In that case, the Board referred to the fact that there were "575 entities whose names contain the term BROADWAY and which offer restaurant and/or related services or goods. Of these, we count well over 300 entities which are designated in the American Business Directory search report as restaurants and/or eating places." Id. at 1562 (footnote omitted). The Board went on to find that BROADWAY CHICKEN was not confusingly similar to BROADWAY PIZZA and BROADWAY BAR & PIZZA, all for restaurant services. The Board relied on the fact that many of the third-party restaurants referred to were located on "a street, road, avenue, etc., named BROADWAY." Id. at 1566.

However, the evidence of record in this case is only a shadow of the evidence that convinced the Board that

confusion was not likely in the Broadway Chicken case. In a more similar case, the Board held that "applicant has not furnished any evidence regarding the extent of use of the marks by these third parties" and "the pictures of these restaurants tend to indicate that the operations are small and local in nature." Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125, 1131 (TTAB 1995). Similarly, the third party uses here appear to be scattered and most of the time the services are not as closely related as the services of applicant and registrant.

As we indicated earlier, the services here are not simply health care services, they are health care services that feature massage. Even if we were to assume that the evidence of the weakness of the mark was entitled to more weight, it is clear that even a weak or descriptive mark is entitled to protection when similar marks are used on services as closely related as the services in this case. See In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover).

Finally, we add that if we had any doubts concerning this issue, "this is a proceeding in which registrant has no opportunity to be heard on this question and it is the

Ser No. 76/213,013

practice to resolve doubt under Section 2(d) with the registrant." In re Mayco Mfg., 192 USPQ 573, 576 (TTAB 1976).

Decision: The refusal to register applicant's mark under Section 2(d) is affirmed.